Office - Supreme Court, U. S.
FILED
SEP 13 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 429

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,

Petitioners,

vs.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF.

R. M. HUGHES, JR.,
ALFRED ANDERSON,
JONATHAN W. OLD, JR.,
W. C. COUPLAND,
Counsel for Petitioners.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary and Contents of Brief	9
Brief in Support of Petition	10

TABLE OF AUTHORITIES.

Page

Alston, et al. v. *School Board of City of Norfolk, et al.*, 112 Fed. 2d, p. 992 3

American Jurisprudence, Vol. 11, pp. 1170 & 1171. 19-26

American Law Reports, Vol. 75, p. 1352 15

Bon Ton Cleaners & Dyers, Inc. v. *Cleaning, Dyeing & Pressing Board*, 176 Sou. 55 28

Cooley on Constitutional Limitations, Vol. 1, pp. 368 and 369 26

Corpus Juris, Vol. 12, pp. 769, 770, 744; Vol. 56, pp. 382, 387, 422 16-25

Eustis v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111 ... 29

Heath v. *Johnson*, 15 S. E. 980 15

Mills v. *Lowndes, et al.*, 26 Fed. Supp. 792 33

Mills v. *Anne Arundel County Board of Education, et al.*, 30 Fed. Supp. 245 33

Mootz v. *Belyea*, 236 N. W. 358 17-34

Mo. ex rel Gaines v. *Canada*, 305 U. S. 337, 83 L. Ed. 208 5-24

Palumbo v. *Fuller Company*, 122 Atl. 63 28

People ex rel Fursman v. *Chicago*, 116 N. E. 158.. 7-22

Pierce v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316 29

Pierce Oil Corp. v. *Phoenix Refining Company*, 259 U. S. 125, 66 L. Ed. 855 31

Ruling Case Law, Vol. 24, p. 613 15

Seattle High School, etc. v. *Sharpless, etc.*, 293 Pac. 994, 72 A. L. R. 1215 7-17-20-34

TABLE OF AUTHORITIES—Continued.

Page

Shepard, et als. v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115 32

State ex rel Gumm, et als. v. *Albritton, et als.*, 224 Pac. 511 23

State v. *Martin*, 163 S. E. 850 15

United States v. *Gale*, 109 U. S. 65, 27 L. Ed. 857 .. 5-27

Wall v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. Ed. 1229 31

Washington v. *State of Florida*, 116 Sou. 470, 278 U. S. 599, 73 L. Ed. 528 5-26

White v. *State of Oklahoma*, 214 Pac. 202 28

Federal Rules of Civil Procedure, Rule 38 33

Norfolk City Charter (Acts of Assembly of Virginia, 1918, p. 31), Section 114 13

Virginia Code—Section 611 11
Section 680 12
Section 786 12
Section 664 13

Virginia Constitution, Article IX—Section 130 ... 11
Section 133 ... 11
Section 140 ... 12

United States Code Annotated, Title 28, Sec. 347. 7

Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,

Petitioners,

vs.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,

Respondents.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

PETITION.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of the School Board of the City of Norfolk, Virginia, a body corporate, and C. W. Mason, Superintendent of Public Schools of the City of Norfolk, Virginia, respectfully shows to this Honorable Court as follows:

1. The above entitled cause was a suit instituted in November, 1939, in the District Court of the United States for the Eastern District of Virginia, at Norfolk, against your petitioners by the respondents, Melvin O. Alston, a negro teacher in the Public Schools of the City of Norfolk, and the Norfolk Teachers' Association, an unincorporated association composed entirely of negro teachers in said Public Schools, for the purpose of obtaining a judgment declaring that the petitioners, in maintaining, as alleged, a salary schedule for teachers in the Public Schools of the City of Norfolk which fixes the salaries of negro teachers at lower rates than those paid white teachers, solely on account of race and color, violate the due process and equal protection clauses of the Fourteenth Amendment; and also to obtain an injunction to restrain petitioners from making any distinction solely on account of race and color in salaries of public school teachers.

2. In the answer filed by your petitioners, legal questions were presented under "First," "Second" and "Third" defenses, which petitioners claim preclude respondents from the relief asked. These legal defenses were (a) that neither C. W. Mason, Superintendent of Schools, nor the Norfolk Teachers' Association, were proper parties to the suit, (b) that no constitutional rights of the respondent Melvin O. Alston had been violated, and (c) that he had waived such constitutional rights, if any he had, by voluntarily entering into and accepting employment under a written contract with said School Board to teach for ten school months beginning September 7, 1939 at a salary of $92.10 per month. (R. 20.)

Under the "Fourth" defense of said answer, petitioners expressly denied that the differences between salaries paid negro teachers and white teachers were solely on grounds of race and color, as alleged in the complaint, but that they are determined by annual written contracts voluntarily entered into between the School Board and the individual teachers, and also denied that any consitutional rights had been violated. At the suggestion of the District Court, the legal questions raised by the "First," "Second" and "Third" defenses of the answer were considered and disposed of in advance of a trial of the case on its merits, and the District Court held (1) that the said Melvin O. Alston and the School Board of the City of Norfolk were the only necessary parties to the suit; (2) that the said Melvin O. Alston having voluntarily entered into a contract with the said School Board to teach and having taught thereunder prior to the institution of this suit, had waived such consitutional rights, if any he has, which he seeks to enforce in this suit; and (3) dismissed the complaint. (R. 23, 30). All of the teachers in the respondent association were under similar contracts and their status with reference to employment is the same as that of the said Melvin O. Alston.

3. From the judgment of the District Court the respondents appealed to the Circuit Court of Appeals for the Fourth Circuit. On June 18, 1940, a decision was handed down reversing the decision of the District Court, the cause having been heard before Circuit Court Judges Parker, Soper and Dobie, Judge Parker having written the opinion. (R. 36). This opinion is reported in 112 Fed. 2d. at p. 992. The mandate was

issued forthwith, and before your petitioners could ask for a stay. When they received notice of the decision and asked for a stay of the mandate, in order to afford them an opportunity to apply to this Honorable Court for a writ of certiorari, they were advised to either ask this Honorable Court for a stay, or else file a petition for a recall of the mandate.

Your petitioners, therefore, ask that this Honorable Court enter the necessary order for the purpose of staying the mandate until this, its petition can be considered.

4. A transcript of the Record is herewith filed. The complaint is found at p. 4. The answer to the complaint is found at pp. 18 and 32. The opinion of the District Court is found at p. 23. The judgment of the District Court is found at p. 30, and the decision of the Circuit Court of Appeals is found at p. 36.

5. The legal questions involved are:

(1) Whether any constitutional rights of the respondents have been violated.

(2) Whether respondents have waived such constitutional rights, if any they have, in the premises.

The merits of these questions will be discussed in the brief herewith filed in support of this petition, and no attempt will be made to elucidate these issues at this point.

6. We shall now undertake to state reasons why we contend that this is a case in which a writ of certiorari should be issued by the Supreme Court.

These reasons are:

A. The Appellate decision in this case has decided a Federal question, in a way probably in conflict with applicable decisions of this Honorable Court.

It is the individual who is entitled to the equal protection of the laws (*Mo. ex rel Gaines* v. *Canada*, 305 U. S. 337; 83 L. Ed. 208). This Court has consistently held that these individual rights can be waived. *Washington* v. *State of Florida*, 278 U. S. 599; 73 L. Ed. 528; *United States* v. *Gale*, 109 U. S. 65; 27 L. Ed. 857; and others cited in the supporting brief herewith.

The District Court applied these decisions to the respondents who voluntarily entered into contracts and taught thereunder without objection, and dismissed the complaint. The Appellate decision reversed this ruling.

B. The Appellate decision decides an important question of Federal law, which has not been, but should be settled by this Court.

This Court has decided the right of negroes to equal State facilities. (*Mo. ex rel Gaines* v. *Canada*, Supra). But it has not decided the important question of the right of voluntary contract between a School Board, a body corporate under State laws, and teachers in the Public Schools of the State whereby the salaries of the teachers are agreed upon and determined.

The Appellate decision in this case holds in effect that such contracts are invalid unless the salaries of white and negro teachers similarly situated are equal. The State is required to provide equal school facilities, but it does not

follow that salaries in Public Schools must be equal when determined by voluntary contracts.

The Constitution and Laws of Virginia provide for a system of Public Schools throughout the State. They are operated and controlled by a State Board of Education and a School Board in each locality. The School Board of the City of Norfolk, as are other local School Boards, is controlled in its functions by State laws. The State Law and Constitution provide that separate schools shall be maintained to afford educational facilities to the children of the State and not for the purpose of affording anyone an opportunity to follow his vocation as a teacher. The teachers in Public Schools of Virginia are not under Civil Service and have no tenure of office. The School Boards of the respective localities are required by the State law to employ the teachers and to enter into annual written contracts with each in form prescribed by the State Board of Education, covering the service to be performed and the compensation to be received by the teacher. Briefly stated, the relations between the School Board and the teacher is that of employer and employee. The applicable school laws are quoted in the supporting brief and will not be quoted at this point.

C. The Appellate decision decides a question of local law in a way probably in conflict with applicable local decisions.

Prior to the institution of this suit counsel for the respondents here instituted a suit in the Circuit Court of the City of Norfolk under the style of *Aline Elizabeth Black* v. your petitioners, *School Board of the City of Norfolk*, a body corporate, and *C. W. Mason, Superintendent of*

Schools of Norfolk, in which the same allegations and prayers were made as in the instant suit. The Court in that case dismissed the complaint. (R. 22). No appeal was taken and the judgment has become final. It is most probable that the Supreme Court of Appeals of Virginia would have affirmed this judgment.

School laws similar to those of Virginia have been upheld in the cases of *Seattle High School, etc.* v. *Sharpless, etc.*, (Wash.), 293 Pac. 994; 72 A. L. R. 1215, and *People ex rel Fursman* v. *Chicago*, 1916, 116 N. E. 158. These are more fully considered in the supporting brief herewith.

7. The jurisdiction of this Court is invoked under Section 240-a of the judicial code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered on June 18, 1940.

Wherefore, upon due consideration of this petition and the annexed brief and the certified copy of the record of the Circuit Court of Appeals for the Fourth Circuit filed herewith, the defendants and petitioners respectfully pray that a stay of the mandate from the Circuit Court of Appeals of the Fourth Circuit in this case may be ordered; that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in this cause, to the end that the same may be reviewed and determined by this Honor-

able Court. And petitioners pray that upon a final consideration of this cause the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court and that the judgment of the United States District Court be affirmed and judgment rendered in favor of the defendant.

Petitioners further pray for such other, equitable and general relief as may appertain to this case and as may be competent for this Honorable Court to grant.

R. M. HUGHES, JR.,
ALFRED ANDERSON,
JONATHAN W. OLD, JR.,
W. C. COUPLAND,
Counsel for Petitioners.

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

Before me, the undersigned Notary Public, personally appeared R. M. Hughes, Jr., who being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioners herein; that he has read the foregoing application for a writ of certiorari; and that all of the facts therein stated are true and correct to the best of his knowledge and belief.

R. M. HUGHES, JR.

Subscribed and sworn to before me
this 4th day of September, 1940.

JULIA K. GOFF,
(Seal) *Notary Public.*

My commission expires February 7, 1943.

SUMMARY AND CONTENTS OF BRIEF.

Page

I. No Constitutional Rights Violated..... 11

A. School Teachers in Virginia are Employees of School Board..... 11

B. Equal Protection Clause of Fourteenth Amendment not Applicable..... 19

II. Respondents by Entering Into Contracts with School Board of City of Norfolk and Accepting Employment Thereunder, Waived Such Constitutional Rights, if any They Have, That They Seek to Enforce..... 24

III. Differentiation of the Mills Cases from the Instant Case..... 33

A. The Equal Protection Clause of the Fourteenth Amendment Has No Application to the Instant Case..... 34

B. The Respondents Have Waived Any Rights to the Relief for Which They Pray..... 37

Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,

Petitioners,

vs.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,

Respondents.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In our petition we have briefly stated the legal questions involved. We will now consider these questions more fully and in the order named:

I.

No Constitutional Rights Violated.

A. School Teachers in Virginia are Employees of School Board.

Sec. 130 of Article IX of the Virginia Constitution, relating to education and public instruction, provides:

> "The general supervision of the school system shall be vested in a State Board of Education, to be appointed by the Governor, subject to confirmation by the General Assembly, and to consist of seven members."

Sec. 133 of the same Article of the Virginia Constitution provides:

> "The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law."

In furtherance of the above provisions, Sec. 611 of the Virginia Code provides:

> "An efficient system of public schools of a minimum school term of one hundred and sixty school days, shall be established and maintained in all of the cities and counties of the State. The public school system shall be administered by the following authorities, to-wit: A State Board of Education, a superintendent of public instruction, division superintendent of schools and county and city School Boards."

Sec. 140 of Article IX of the Virginia Constitution provides:

> "White and colored children shall not be taught in the same school."

Sec. 680 of the Virginia Code provides:

> "White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

Neither of the above provides that the teachers in the schools for white children shall be white and those in the schools for colored children shall be colored.

There is no provision in either the Virginia Constitution or the Virginia Code prescribing what salaries teachers in the public schools shall receive. This is left to the discretion of the School Board.

The School Board has a very wide discretion in the management of the public schools.

Sec. 786 of the Virginia Code, relating to the powers and duties of the School Board, provides, in so far as is material to this case, as follows:

> "The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth for the accomplishment of which purpose it shall have the following powers and duties.
>
> ". . . . . .

> "Third. To employ teachers from a list or lists of eligibles to be furnished by the division superintendent and to dismiss them when delinquent, inefficient or in anywise unworthy of the position. . . .
>
> ". . . . . .
>
> "Twelfth. To manage and control the school funds of the city, to provide for the pay of teachers and of the clerk of the board for the cost of providing school houses . . .".

Sec. 664 of the Virginia Code relating to contracts with teachers provides, in so far as is material to this case, as follows:

> "Written contracts shall be made by the School Board with all public school teachers, before they enter upon their duties, in a form to be prescribed by the superintendent of public instruction. Such contracts shall be signed in duplicate, each party holding a copy thereof. . . ."

The State of Virginia has no tenure of office act covering teachers. They are expressly excluded from the civil service classification of city employees by Sec. 114 of the Norfolk Charter, which provides:

> "Officers who are elected by the people . . . the teachers in the public schools and all other persons employed by the school board . . . shall not be included in such classified service . . .". (Acts of Assembly of Virginia, 1918, pp. 31, 85.)

The teachers in the public schools have no vested rights in the positions they hold. Each year they are

selected by the School Board in May or June to teach for the school term beginning in September following. Their term of service is not fixed by any law but by the provisions of the contract required by law. They have no special right or privilege to teach in the public schools of the city. These contracts are entered into between the School Board and the teacher each year, regardless of whether the teacher has taught in the public schools for prior years or is a beginner. The contract specifies the time for which employed, the rate of compensation, their duties, that they may be changed from one teaching position to another, and other phases of their employment. Under the Virginia law the School Board could, at the term beginning next September, contract with an entire new corps of teachers for all of the public schools of the City of Norfolk and none of the present teachers would have any legal redress in the matter.

The respondent Alston, by entering into such a contract, in writing, voluntarily executed by him and the School Board under date of June 12, 1939, agreed to teach in the public schools of the City of Norfolk for ten (10) school months beginning September 7, 1939, for $92.10 per school month. At the time of the execution of these contracts respondents knew, or with reasonable diligence could have ascertained, the exact salary paid any other teacher in the public schools for the same term. The members of the Norfolk Teachers' Association were all similarly situated.

From the foregoing provisions of Virginia law it is clear that public school teachers are not officers of the State or political subdivisions wherein they teach but are employees of the School Board.

In the case of *Heath* v. *Johnson*, (W. Va. 1892), 15 S. E. 980, which involved a mandamus by a publishing company against a teacher in the public schools to require the teacher to use a certain text book, the same was refused, and the Court, at p. 982 of the opinion, said:

> "What we do decide is that a teacher in this State is not a public officer but is an employee . . ."

To the same effect is the decision in the case of *State* v. *Martin*, (W. Va.), 163 S. E. 850.

In *75 A. L. R.*, p. 1352, under the Annotation "Status of teacher as an officer or employee," the following appears, with a long citation of cases to support it:

> "The Courts are almost unanimous in holding that the position of teacher is that of an employee, resting on the contract of employment, and not that of public officer."

In *Ruling Case Law*, Vol. 24, p. 613, under the subject of "Schools," the following appears:

> "Under the general powers usually reposed in local school boards is included the power to enter into contracts with teachers and fix their compensation and term of employment.
>
> "The discretion of a school board in this respect is very broad, and the Courts will not interfere to aid one whom the board does not choose to employ.

> "The board has the absolute right to decline to employ any applicant for any reason whatever or for no reason at all.
>
> "It is no infringement on the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, of fair complexion or dark, is or is not a member of a trade union, or whether no reason is given for such refusal."

In *56 C. J.*, p. 422, under "Schools and School Districts," the following appears:

> "The amount or rate of compensation which a teacher is entitled to receive for his services depends upon the terms of the contract under which he is employed."

and at p. 382:

> "A teacher, who has been appointed to the position and accepted it, from the time of his acceptance stands in a contract relation as distinguished from the tenure or holding of a public officer. He holds his position by contract and not at the will of the sovereign power."

and at p. 387:

> "Except in so far as they be restricted or limited by statute, or by a rule or regulation of the school board, a school board of officers authorized to contract with teachers have the power to fix the salaries to be paid them, free from interference by other municipal authorities."

In the case of *Mootz* v. *Belyea, et als.*, (N. D.), 236 N. W. 358, a written contract between the teacher and the School Board had been executed. Thereafter the School Board refused to let the teacher teach and employed another in her place. The teacher brought a mandamus against the School Board to require it to install her as a teacher in the public schools, claiming that she had been denied the use and enjoyment of a right or office. The Court denied the mandamus, stating that her remedy in the case was for the recovery of her salary under the contract and as to that she had an adequate remedy at law, and in the course of its opinion, stated:

> "It is the claim of the appellant that she is being denied the 'use and enjoyment of a right or office' to which she is entitled. Whether her contract gives her a right or office depends upon her relationship to the school board and her right under her contract. The duty of employing teachers is vested in the school board, and this is done by contract. The relationship is purely contractual in this State. There is no fixed tenure of office when a teacher is employed other than the pension set forth in the contract. In this State the profession is not under civil service rules. When a teacher is employed by a school district she is not employed as an officer and she does not become an officer. Her rights are measured by the terms of her contract."

In the case of *Seattle High School, etc.* v. *Sharpless, etc.*, (Wash.), 293 Pac. 994, 72 A. L. R. 1215, which involved the employment of a teacher, and from which it appears that the statutes relating to

such are similar to those in Virginia, the Court, in defining the relationship between the School Board and the teacher, said:

> "The employment of teachers is a matter of treaty or voluntary contract. Both parties must consent and be mutually satisfied and agreed. On the part of each it is a matter of choice and discretion. However, though qualified, no teacher has the legal right to teach in the schools until the directors willingly enter into a contract for that purpose. Unless limited by statute in some way, the board is entitled to the right of freedom of contract as much as the teachers are."

In the Opinion of the Judge of the District Court, the following appears:

> "Whatever may be the law in other States, there is no doubt that in Virginia a person can not under the law as it now exists and has existed for many years, acquire a status as a teacher, which gives him certain rights that must be respected, independently of a contract with the board as a teacher. In Virginia the relation is not a continuing one, but can be created only by a contract with the school board in a particular jurisdiction. It continues for only one school year at a time, with the absolute right on the part of the school board not to contract again with the particular person. The board may decline to contract again with such person without rhyme or reason for such refusal and in that particular part of the board's procedure there manifestly has been no discrimination on account of race or color, for the simple reason that the board

> can, after the expiration of the school year, decline to have any further contractual relations with an applicant to teach, whether such applicant be white or colored." (R. 27.)

B. Equal Protection Clause of Fourteenth Amendment not Applicable.

The Virginia Constitution and Code as set out above provide that an efficient system of public free schools shall be established and maintained throughout the State.

The object of this is to afford educational advantages to the children of the State, *not to afford opportunities for persons to follow their vocation as teachers.*

The gist of the equal protection clause of the Fourteenth Amendment is *to extend to all citizens substantially equal treatment in facilities* provided from public funds.

The school facilities provided from public funds are the right to attend school, not the right to teach in a public school. While it may be incumbent on the School Board to maintain schools for the education of children, it is not incumbent on them to maintain a place for one to follow his vocation as a teacher.

In *American Jurisprudence*, Vol. 11, at page 1171, under "Constitutional Law," the following appears:

> "In those cases which have considered employment contracts from the standpoint of the employer, the Courts have held that it is clear that the right of an employer to employ labor is necessarily included in the constitutional guaranty of the right to property. The

> employer may, generally speaking, enter into labor contracts with such individuals as he chooses. Thus, the refusal of the board of directors of a school district empowered to employ teachers to engage a certain person, for any reason or no reason at all, is in no sense a denial of the constitutional right, guaranteed by the due process of law provision, of that person to follow his chosen profession."

In the case of *Seattle High School, etc.* v. *Sharpless, etc.*, Supra, the school directors adopted a resolution:

> "That no person be employed hereafter, or continued in the employ of the District as a teacher while a member of the American Federation of Teachers, or any local thereof . . ."

The plaintiff claimed the resolution was unconstitutional. The Court held the same valid.

The laws of the State of Washington governing the operation of public schools were similar to those of Virginia in this respect and authorize the school directors:

> "First: To employ for not more than one year, and for sufficient cause to discharge teachers, and to fix, alter, allow and order paid their salaries and compensation . . ."

The Court, in its opinion sustaining the resolution of the board, said with reference to the status of teachers:

> "The employment of teachers is a matter of treaty or voluntary contract. Both parties

must consent and be mutually satisfied and agreed. On the part of each it is a matter of choice and discretion. However, though qualified, no teacher has the legal right to teach in the schools until the directors willingly enter into a contract for that purpose. Similarly the directors have no legal right to the services of any teacher until the teacher voluntarily enters into a contract for that purpose. Unless limited by statute in some way the board is entitled to the right of freedom of contract, as much so as the teachers are."

It was also claimed by the plaintiff that the resolution violated the Constitution of Washington State and the Fourteenth Amendment to the Constitution of the United States. As to this the Court said:

> "Quoting Article 1, Sec. 3, of the State Constitution, viz., 'No person shall be deprived of life, liberty, or property without due process of law,' and also the Fourteenth Amendment to the Constitution of the United States on the same subject, it is argued on behalf of appellants that thereunder the right of a teacher to follow his chose profession is too elementary to require any discussion. Granted, but there is no question of that kind in this case. The right of freedom of contract as it exists in this case to refuse for any reason or no reason at all to engage the professional services of any person is in no sense a denial of the constitutional right of that person to follow his chosen profession. . . . Nor can the Courts be successfully invited into a consideration of the policy of the resolution, for that would lead to supervisory control of judgment and dis-

> cretion in the selection and employment of teachers which the statute has given exclusively to the board of directors."

In the case of *People ex rel Fursman* v. *Chicago*, (1916), 116 N. E. 158, the issue was whether the Board of Education had the right in the selection of teachers to discriminate between those who were members of a federation or union and those who were not members of any such federation or union, and whether its action in such regard violated any constitutional or statutory provision.

The Court held the Board of Education had such right and that no such constitutional provision was violated.

From the opinion it appears that the Illinois school laws were similar to those of Virginia. At page 160 the Court said:

> "By the statute the Board of Education in cities having a population of 100,000 or more is given complete control of the schools of the city. Among its powers is that of employing teachers and fixing the amount of their compensation . . . The Board has no power to make contracts for the employment of teachers to extend beyond the ensuing school year, . . . A new contract must be made each year with such teachers as it desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The Board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all. The Board is responsible for its action only to the people of the city, from whom, through

the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the Board to decline to employ him as a teacher, in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The Board is not bound to give any reason for its action. It is free to contract with whomsoever it chooses. Neither the Constitution nor the statute places any restriction upon this right of the Board to contract, and no one has any grievance which the Courts will recognize simply because the Board of Education refuses to contract with him or her. Questions of policy are solely for determination of the Board, and when they have once been determined by it the Courts will not inquire into their propriety."

In the case of *State ex rel Gumm, et als.* v. *Albritton, et als.*, (Okla. 1923), 224 Pac. 511, it appears that the county superintendent discharged the negro members of the School Board of the School District in which a majority of the population was of the colored race, and appointed white persons on the Board.

The action was brought to oust the white members of the Board and have colored members adjudged the lawful members of said School Board. This the Court refused to do.

At p. 512 of the opinion, the Court said:

"It is contended by plaintiff in error that the said action of the county superintendent in

> the instant case violates the Fourteenth Amendment to the Constitution of the United States, in that such action of said county superintendent, in discharging the colored members and appointing defendants in error, was a denial of the equal protection of the law to the colored children. However, no authorities are cited thereunto. It does not appear, nor did plaintiff in error offer to show, that by the action of said county superintendent in designating the colored school as the separate school, or by the change of the personnel of the said board, the facilities or accommodations for the colored children of such district were not rendered impartial, as compared with those of the white children."

and at p. 513:

> "However arbitrary the action of such superintendent may seem, it cannot be said that the equal protection clause of said Fourteenth Amendment is violated, because it is now shown that accommodations of facilities equal, though not identical, with those of white children, are afforded to the colored children."

II.

Respondents By Entering Into Contracts With School Board of City of Norfolk and Accepting Employment Thereunder, Waived Such Constitutional Rights, If Any They Have, That They Seek to Enforce.

The respondents' rights, if they have any, are personal to them as individuals. It is as individuals that they are entitled to the equal protection of the laws. (*Mo.* v. *Canada*, 305 U. S. 337, 83 L. Ed. 208.)

The respondents, as stated above, have voluntarily contracted in writing with the School Board to teach for the current school term for a stipulated salary. This contract antedates the filing of these proceedings by them. There is no complaint that the School Board has breached any part of its contract.

While we do not consider, for reasons set forth above, that any constitutional rights of the respondents have been denied, yet, in any event, they have waived the same, and are accordingly estopped to prosecute this cause.

In *12 C. J.*, at p. 769, under the heading "Constitutional Law," the following appears:

> "A person may by his acts, or omission to act, waive a right which he might otherwise have under the provisions of the Constitution."

and at p. 770:

> "The waiver of a Constitutional provision precludes the party waiving it from afterwards claiming protection under it, even though it was adopted solely for his benefit, and such a waiver is binding as to both past and future transactions."

and at p. 774:

> "But those Constitutional guaranties, which are in the nature of personal privileges of the accused, may be waived by him and therefore he may not question the Constitutionality of the statute under which he has made such a waiver."

In *11 American Jurisprudence*, at p. 1170, under "Constitutional Law," appears the following:

> "It has repeatedly been held that the right of a laborer to enter into contracts for his services is property within the meaning of the Constitutional guaranties."

In *Cooley on Constitutional Limitations*, Vol. 1, p. 368, the author says:

> "Where a Constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will."

and at p. 369:

> "On this ground it has been held that an act appropriating the private property of one person for the private purpose of another, on compensation made, was valid if he whose property was taken assented thereto and that he did assent and waive the Constitutional privilege, after he received the compensation awarded or brought an action to recover it."

and again at p. 368:

> "There are cases where a law in its application to a particular case must be sustained because the party who makes the objection has by his prior action precluded himself from being heard against it."

The case of *Washington* v. *State of Florida*, 116 Southern 470, in which a writ of certiorari was denied by the Supreme Court of the United States, 278 U. S.

599, 73 L. Ed. 528, involved the exclusion of negroes from juries. Herein the accused claimed he had been denied equal protection of the laws guaranteed him by the Fourteenth Amendment to the Federal Constitution.

The Florida Supreme Court in this case held:

> "While an unlawful discrimination against negroes because of their race or color practiced by an officer in summoning jurors may render the act of summoning illegal, the panel of jurors may not be illegal."
>
> "Where a jury that is competent under the law and that is impartial as is required by the Constitution has been tendered it may be accepted by the accused who thereafter waives his right to object to the panel on the ground that in summoning the jurors members of his race were discriminated against, there being no duress or other improper influence to embarrass or injure the accused."

In the case of *United States* v. *Gale*, 109 U. S. 65, 27 L. Ed. 857, which was a criminal case wherein there was an irregularity in selecting the grand jury which found the indictment, the accused plead not guilty and went to trial without making any objection as to the grand jury selection, and after conviction raised the Constitutionality of the same. The Court said:

> "The second question, as to the Constitutionality of the 820th Section of the revised statutes . . . is not an essential one in this case inasmuch as by pleading not guilty to the indictment and going to trial without making any objection to the mode of selecting the grand jury, such objection was waived."

In the case of *Bon Ton Cleaners and Dyers, Inc.* v. *Cleaning, Dyeing and Pressing Board*, February, 1937, Florida, 176 Southern 55, certain parties who signed a specific agreement with all other parties in a certain area to observe price-fixing regulations of said Cleaning, Dyeing and Pressing Board in the County, prior to the time order prescribing regulations was entered, were held precluded from questioning the constitutionality of the statute authorizing price-fixing for such business.

In the case of *White* v. *State of Oklahoma*, 214 Pac. 202, which was a criminal case, the jury was sworn and the County attorney then asked leave to amend the information. The information was amended and the defendant asked for and was given twenty-four hours to plead to the amended information. The jury then impaneled was without objection on the part of the defendant discharged. Several days thereafter when the case came to trial on the amended information the accused filed a plea in bar claiming former jeopardy. The Court held the plea was properly overruled by the lower court on the ground that the accused had waived his rights in the matter and, at p. 205 of the opinion, said:

> "Where a Constitutional right is for the sole benefit of the accused, in the nature of a privilege, that right may be waived by express consent, or by implication from conduct indicative of consent, or by failure to claim or assert the right in seasonable time."

In *Palumbo* v. *Fuller Co.*, Conn., 122 Atl. 63, the employer appealed from an award for claimant.

One of the grounds assigned was the alleged unconstitutionailty of the Workmen's Compensation Act. The Court, at p. 65, said:

> "A ground of appeal that is fundamental is a claim that the Commissioner erred in not holding that Section 5345 is unconstitutional; as this question is independent of the finding it may be considered at the outset.
>
> ". . . . . .
>
> "The acceptance of Part B of the Act is voluntary on the part of an employer. When he so accepts the Act, he cannot thereafter urge that its provisions are ineffective in whole or in part because of any impairment of the constitutional rights of an employer. This reason of appeal cannot be sustained."

In the case of *Pierce* v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316, which involved a railroad mortgage and whether a State statute impaired the obligation of the contract, the Court, at p. 648, said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by failure to act, or by his action, is not a Federal one."

In the case of *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, the validity of insolvency proceedings had under a Massachusetts statute was involved. The Court said:

"The defendants in the trial court depended on a discharge obtained by them under regular proceedings, under the insolvency statutes of Massachusetts. This defense the plaintiffs met by alleging that the statutes, under which the defendants had procured their discharge, had been enacted after the promissory note sued on had been executed and delivered, and that, to give effect to a discharge obtained under such subsequent laws, would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts, it is plain that a Federal question, decisive of the case, was presented, and that if the judgment of the Supreme Judicial Court of Massachusetts adjudged that question adversely to the plaintiffs, it would be the duty of this Court to consider the soundness of such judgment.

"The record, however, further discloses that William T. Eustis, represented in this Court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the Court below, conceding that his cause of action could not be taken from him, without his consent, by proceedings under statutes of insolvency passed subject to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment."

The Supreme Court of the United States did not disturb the aforesaid ruling of the Massachusetts Court.

In the case of *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. Ed. 1229, the Court said:

> "There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two-thirds of the outstanding capital stock of the corporation, and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient, or, if they prefer, the value in money of their stock, to be determined by three appraisers, or, still at the election of the appellants, by a court and jury.
>
> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them."

In the case of *Pierce Oil Corporation* v. *Phoenix Refining Company*, 259 U. S. 125, 66 L. Ed. 855, which involved the making of a pipe line company a common carrier, the Court held:

> "The right of a foreign corporation to be secure against the imposition of conditions upon its right to do business which amount to a taking of its property without due process of law may be waived, or the right to claim it

> barred, by deliberate election, or by conduct inconsistent with the assertion of such right."

In the case of *William Shepard, et als.* v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115, the constitutionality of an act regarding assessments against abutting property owners for improvements was assailed because the act provided that the assessments should be made on a front foot basis and not according to the special benefits derived.

The plaintiffs had by petition requested the work and impliedly agreed to pay for the same on the front foot assessment basis.

The Court held that they had waived any constitutional rights they might have, and at p. 566 of the opinion said:

> "It is, therefore, upon these facts, immaterial that the law under which the proceedings were conducted was unconstitutional, because the work was done at the special request of the owners, under the provisions of the act, and upon a contract, both implied and in substance expressed, that the bonds would be paid, and the assessment to be imposed for the raising of a fund to pay them would be legal and proper."

and at p. 568 said:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision. . . ."

One of the most sacred personal rights is that of trial by jury. The Seventh Amendment to the United States Constitution provides that in suits at common law the right of trial by jury should be preserved. The rules of civil procedure promulgated for the District Courts by the Supreme Court of the United States provide that the failure of a party to demand a jury as required by the Rules shall constitute a waiver by him of trial by jury (Rule 38). If one can waive his right to trial by jury by his mere inaction, surely the respondents can waive their rights in the Fourteenth Amendment, if any they have, by a contract in writing voluntarily executed by them.

The cases cited by respondents in the lower courts dealing with the question of waiver in matters of compensation relate to salaries the amount of which are definitely fixed and prescribed by law, the Courts holding in such cases that an acceptance of any less amount would be contrary to public policy and place the positions for said salaries in the category of barter and exchange. In the instant case the salaries are not fixed by law but are left as a matter of contract between the teachers and the School Board.

III.

Differentiation of the Maryland Cases From the Instant Case.

The Maryland Cases.

The two cases of *Mills* v. *Lowndes, et al.*, 26 Fed. Supp. 792, (D. C., Md. 1939), and *Mills* v. *Anne Arundel County Board of Education, et al.*, 30 Fed.

Supp. 245, (D. C., Md. 1939), were quoted from and cited with such frequency by respondents in the lower courts as being directly in point with the instant case that petitioners are prompted to deal with the same at some length and apply the facts and conclusions of those cases to the issues of constitutional rights and waiver as raised herein.

A. The Equal Protection Clause of the Fourteenth Amendment Has No. Application to the Instant Case.

The plaintiff, Mills, pursuant to Maryland school laws, was employed under a continuing contract which required an oath of office to be taken and subscribed. He further, after the expiration of a probationary period, became possessed of a right of property in his teaching position by virtue of tenure and could only be dismissed for stated cause, and after opportunity to be heard in his own defense. The respondent Alston, as are all other teachers in the public schools of Norfolk, on the other hand, is employed only on an annual basis and having no tenure of office, is possessed of no vested interest therein.

The case of *Mootz* v. *Belyea*, Supra, discusses fully the rights accruing to and the differences existing between a teacher with a fixed tenure of office and a teacher whose relationship of employment is purely contractual, how, if improperly dismissed, the former could proceed by mandamus for reinstatement but the latter would be relegated to an action for damages under the contract.

It is the contention of petitioners that respondents having no rights to employment (*Seattle High School, etc.* v. *Sharpless*, Supra) and having no vested interests

in their positions after employment, are therefore without rights to be protected by the equal protection clause of the Fourteenth Amendment. The plaintiff Mills, however, while not possessing any right to employment, subsequent thereto, did acquire a vested right in his position and consequently a fixed property right therein to protect.

District Judge Chestnut distinguishes between the plaintiff Mills as a public employee and as a teacher by occupation in holding that the action could be maintained for violation of constitutional rights, stating:

> "I conclude, therefore, that the plaintiff does have a status, not as a public employee, but as a teacher by occupation, which entitles him to raise the constitutional question."

Early in his opinion, however, he recognized the question as being one on which there is little available judicial authority and makes this pertinent observation:

> "In view of the fact that the amendment has been in force for 75 years, the absence of authority on the point is itself rather significant in the indication that it has not heretofore been thought the amendment applied to such a case."

It is submitted that the conclusion reached by Judge Chestnut is predicated upon the status of the plaintiff Mills and is only intended to embrace those teachers by occupation who possess a fixed tenure of office.

Correlated with the question of whether constitutional rights have been violated, is the factor of discretion in employment and salary fixing by the local board in the instant case. Judge Chesnut stresses the Maryland statutes prescribing minimum rates of pay and their application, stating:

> "Each County Board in cooperation with the County Commissioner as to the tax rate is free to determine the amount and quality of its educational facilities and has power to select its teachers and determine their compensation. *It may, in the exercise of its lawful discretion, decide whether to employ white or colored teachers for the colored schools; nor is it required to employ any particular teacher, whether white or colored, although duly qualified. And it may be observed that if the minimum salary schedules were written out of the law as unconstitutional, the local Boards will have unlimited discretion as to the amount to be paid the teachers.*" (Italics ours.)

It is also to be noted that an injunction was denied to the extent prayed for that colored teachers and principals shall not receive less salaries than white teachers and principals filling equivalent positions in the public schools.

The State of Virginia has no statute prescribing rates of pay, minimum or maximum, for teachers and principals in the public schools, but leaves the determination thereof entirely within the discretion of the local board to be incorporated in voluntary contracts.

B. The Respondents Have Waived Any Rights to the Relief for Which They Pray.

In the two *Mills cases* the contract of employment does not fix or designate the rate of pay but provides only that it shall not be less than the minimum salary provided by law. There is, therefore, no agreement as to salary and consequently no basis for waiver therein. In addition the plaintiff Mills was the principal of a colored elementary school, the minimum salary for which is not prescribed by the State of Maryland's minimum statutes.

In the instant case the actual rate of pay is fixed by agreement in the contract of employment.

Respectfully submitted,

R. M. Hughes, Jr.,
Alfred Anderson,
Jonathan W. Old, Jr.,
W. C. Coupland,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
OCT 7 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 429

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,
Petitioners,

v.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,
Respondents

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LEON A. RANSOM
1512 Girard Street, N.E.
Washington, D. C.
THURGOOD MARSHALL
Baltimore, Md.
Counsel for Respondents

WILLIAM H. HASTIE
Washington, D. C.
OLIVER W. HILL
Richmond, Va.
BENJAMIN KAPLAN
New York, N. Y.
W. ROBERT MING, JR.
Chicago, Ill.
Of Counsel

Printed by Law Reporter Ptg. Co., 518 5th St., Washington, D. C.

SUBJECT INDEX

PAGE

Statement of Facts 1

Questions Involved 3

Argument

I. The decision that the alleged salary discrimination is a denial of equal protection of the laws is so clearly sound and consistent with precedent that it should not be reviewed 3

A. There is no conflict in the federal decisions on this proposition 3

B. There is no conflict between the decision of the Circuit Court of Appeals and applicable local decisions 4

C. The decision of the Circuit Court of Appeals is consistent with the course of decisions of this court construing the Fourteenth Amendment to the Constitution of the United States 5

II. The issue of waiver should not be reviewed upon the present record 6

Conclusion 9

TABLE OF CASES

	PAGE
Black v. School Board of the City of Norfolk (Unreported)	5
Buchanan v. Warley, 245 U. S. 60	6
Ex parte Virginia, 100 U. S. 339	6
Gaines v. Missouri, 305 U. S. 337	6
Gilbert v. Highfill, — Fla. —, 190 So. 813	5
Lane v. Wilson, 307 U. S. 268	6
McCabe v. A. T. & Santa Fe Ry. Co., 235 U. S. 151	6
Mills v. Anne Arundel County Board of Education, et al., 30 F. Supp. 245	4
Mills v. Lowndes, et al., 26 F. Supp. 792	4
Nixon v. Condon, 286 U. S. 73	6
Pierre v. Louisiana, 306 U. S. 354	6
Strauder v. West Virginia, 100 U. S. 303	6
Truax v. Raich, 239 U. S. 33	6
Yick Wo v. Hopkins, 118 U. S. 220	6
Yu Cong Eng v. Trinidad, 271 U. S. 500	6

STATUTES AND RULES CITED

Virginia Code:	
Section 664	7
Section 786	7
Federal Rules of Civil Procedure:	
Rule No. 7 (a)	8
Rule No. 8 (c)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 429

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,
Petitioners,

v.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,
Respondents

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In opposing the petition for certiorari filed by petitioners herein, respondents respectfully show:

STATEMENT OF FACTS

Petitioners seek review of a judgment rendered upon pleadings. The judgment does not accomplish a final disposition of the case but merely decides that the complaint is legally sufficient and orders a trial of the controversy for the first time on its merits.

Respondents as plaintiffs in the District Court of the United States for the Eastern District of Virginia filed their complaint against the defendant School Board and the defendant Superintendent of Schools seeking a permanent

injunction against, and a judgment declaratory of, alleged unconstitutional racial discrimination in administratively established schedules of salaries for white and colored teachers in the City of Norfolk and in the salaries actually paid pursuant to such schedules. The essence of the complaint appears in paragraphs 11 and 12 thereof where it is alleged that:

> "11. Defendants over a long period of years have consistently pursued and maintained and are now pursuing and maintaining the policy, custom, and usage of paying Negro teachers and principals in the public schools of Norfolk less salary than white teachers and principals in said public school system possessing the same professional qualifications, certificates and experience, exercising the same duties and performing the same services as Negro teachers and principals. Such discrimination is being practiced against the plaintiffs and all other Negro teachers and principals in Norfolk, Virginia, and is based solely upon their race or color."
>
> "12. The plaintiff Alston and all of the members of the plaintiff association and all other Negro teachers and principals in public schools in the City of Norfolk are teachers by profession and are specially trained for their calling. By rules, regulations, practice, usage and custom of the Commonwealth acting by and through the defendants and its agents and agencies, the plaintiff Alston and all of the members of the plaintiff association and all other Negro teachers and principals in the City of Norfolk are being denied the equal protection of the laws in that solely by reason of their race and color they are being denied compensation from public funds for their services as teachers equal to the compensation provided from public funds for and being paid to white teachers with equal qualifications and experience for equivalent services pursuant to rules, regulations, custom and practice of the Commonwealth acting by and through its agents and agencies, the School Board of the City of Norfolk and the Superintendent of Schools of Norfolk, Virginia." (Record, pp. 7, 8.)

As appears in the judgment of the District Court (Record, pp. 30-31), the cause came on, at the suggestion of the District Judge, for preliminary hearing solely upon the issue of the legal sufficiency of the complaint as raised by so much of the answer as was in the nature of a motion to dismiss. Upon such hearing the District Court entered a final order sustaining the motion to dismiss the complaint. From that order the respondents appealed. The Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and remanded the cause for trial (Record, p. 45).

QUESTIONS INVOLVED

I. THE DECISION THAT THE ALLEGED SALARY DISCRIMINATION IS A DENIAL OF EQUAL PROTECTION OF THE LAWS IS SO CLEARLY SOUND AND CONSISTENT WITH PRECEDENT THAT IT SHOULD NOT BE REVIEWED.

II. THE ISSUE OF WAIVER SHOULD NOT BE REVIEWED UPON THE PRESENT RECORD.

ARGUMENT

I

The Decision That the Alleged Salary Discrimination Is a Denial of Equal Protection of the Laws Is So Clearly Sound and Consistent With Precedent That It Should Not Be Reviewed

A. *There Is No Conflict in the Federal Decisions on This Proposition*

On the three other occasions that federal courts have passed on this question the decisions have been in accord with the conclusion reached by the Circuit Court of Appeals that:

"Plaintiffs, as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination as to the rate of pay to be awarded them, if their applications are accepted." (Record, p. 43.)

Even the District Court conceded that:

"The authorities are clear—that there can be no discrimination in a case of this kind, if such discrimination is based on race or color alone." (Record, p. 24.)

The only other federal court in which the question has been raised is that of the United States District Court for the District of Maryland. That court twice reached the same conclusion.

Mills v. *Lowndes et al.*, 26 F. Supp. 792 (1939);
Mills v. *Anne Arundel County Board of Education et al.*, 30 F. Supp. 245 (1939).

In the latter case the Court said:

". . . As already stated, the controlling issue of fact is whether there has been unlawful discrimination by the defendants in determining the salaries of white and colored teachers in Anne Arundel County solely on account of race or color, and my finding from the testimony is that this question must be answered in the affirmative, *and the conclusion of law is that the plaintiff is therefore entitled to an injunction against the continuance of this unlawful discrimination.*" (Italics supplied.) (30 Fed. Supp. at 252.)

B. *There Is No Conflict Between the Decision of the Circuit Court of Appeals and Applicable Local Decisions*

Although no question of local law is here presented since the right claimed by the respondents is one guaranteed by the Constitution of the United States, actually there is no

decision of a state court in conflict with that of the Circuit Court of Appeals here.

In the only reported state case, *Gilbert* v. *Highfill*, — Fla. —, 190 So. 813 (1939), mandamus was sought to compel the adoption of an equal salary schedule for white and Negro teachers. The Supreme Court of Florida held that mandamus would not lie to compel the adoption of any salary schedule, expressly stating however, at page 815:

> "We fully agree with counsel for the relator and the authorities cited in their brief on the question of discrimination and an equal protection of the law as guaranteed by the 14th Amendment to the Constitution of the United States, U. S. C. A. *We do not think either of these questions is presented by the record.*" (Italics supplied.)

In the unreported case of *Aline Black* v. *The School Board of the City of Norfolk et al.*, the Circuit Court of the City of Norfolk considered a demurrer to a similar petition for mandamus and ruled that mandamus was not the proper remedy. No mention was made of the substantive question here involved. (Record, p. 23.)

Similar actions filed in the Maryland counties of Montgomery, Prince George's and Calvert were made moot before trial by equalization of salaries pursuant to agreement.

Thus the state courts upon whose decisions petitioners rely have passed only on the procedural question and have not adjudicated the substantive question involved here.

C. *The Decision of the Circuit Court of Appeals Is Consistent With the Course of Decisions of This Court Construing the Fourteenth Amendment to the Constitution of the United States.*

It is submitted that certiorari should not be granted because the judgment of the Circuit Court of Appeals is clearly

sound, consistent with and follows closely a long line of precedents established by this Court.

A general effect of the Fourteenth Amendment to the Constitution of the United States is to prohibit arbitrary and unreasonable classification by state agencies.

Yu Cong Eng v. *Trinidad*, 271 U. S. 500 (1926);
Truax v. *Raich*, 239 U. S. 33 (1915);
Yick Wo v. *Hopkins*, 118 U. S. 220 (1886).

Discrimination because of race or color is clearly arbitrary and unreasonable. This Court has repeatedly so held in cases arising out of a variety of factual situations.

Lane v. *Wilson*, 307 U. S. 268 (1939);
Pierre v. *Louisiana*, 306 U. S. 354 (1939);
Gaines v. *Missouri*, 305 U. S. 337 (1938);
Nixon v. *Condon*, 286 U. S. 73 (1932);
Buchanan v. *Warley*, 245 U. S. 60 (1917);
McCabe v. *A. T. & Santa Fe Ry. Co.*, 235 U. S. 151 (1914);
Strauder v. *W. Virginia*, 100 U. S. 303 (1879);
Ex parte Virginia, 100 U. S. 339 (1879).

By the motion to dismiss petitioners have admitted that the existing salary differentiation is based solely on the race and color of the respondents and that it is adopted, maintained and enforced by petitioners acting for the Commonwealth of Virginia.

The Circuit Court of Appeals has logically applied the doctrine established by this Court to the facts of the instant case.

II

The Issue of Waiver Should Not Be Reviewed Upon the Present Record

Respondents agree with petitioners that it is an important Federal question whether Negroes who accept employment as public school teachers thereby waive their right to

complain that they are denied the equal protection of the laws by salary discrimination based solely upon race and imposed and required by rule, regulation and practice of an agency of the State. However, neither the present state of the record upon that issue nor the scope of the decision of the Circuit Court of Appeals warrants the granting of certiorari.

Paragraph 10 of the complaint (Record, p. 7) alleges that defendants, petitioners here, are under a statutory duty to employ teachers and to provide for the payment of their salaries, citing, *inter alia,* Section 786, of the Virginia Code of 1936 which provides in part that

> "The City school board of every city shall . . . have the following powers and duties . . . Third. To employ teachers . . . Twelfth. To . . . provide for the pay of teachers . . ."

It is further provided in Section 664 that

> "Written contracts shall be made by the school board with all public school teachers before they enter upon their duties, in a form to be prescribed by the Superintendent of Public Instruction."

Paragraph 15 of the complaint (Record, p. 9) alleges that plaintiff Alston, respondent here,

> "is being paid by the defendants for his services this school year as a regular male high school teacher as aforesaid an annual salary of $921."

Thus, from the complaint and the above quoted language of applicable Virginia statutes it seems a proper conclusion that respondent Alston is employed during the current year pursuant to a contract of hire and at an annual salary of $921. Moreover, in a preliminary proceeding in the nature of a hearing on motion to dismiss the complaint it was proper that the court determine whether any conclusion of

law fatal to the respondents' case followed from the facts outlined above. To that extent, and to that extent only, the question of waiver was before the District Court and the Circuit Court of Appeals.

It is to be noted that so much of the "Second Defense" in the answer as raises the issue of waiver is in form a defense in law in the nature of a motion to dismiss, but in substance it combines a challenge to the sufficiency of the complaint with an introduction of new matter in the nature of an affirmative defense. Thus, the sub-paragraphs numbered (4) and (5) (Record, p. 19) go beyond an allegation that acceptance of employment by the respondent is a waiver of the rights asserted in his complaint. These sub-paragraphs refer to the specific contract of the respondent and incorporate by reference an attached document described as a copy of his contract. In thus going beyond the fact of employment pursuant to a contract of hire as already revealed by the complaint and pertinent statutes, and in attempting to put in issue the terms of a particular contract, the circumstances of its execution and any legal conclusions that may depend upon such terms and circumstances, the petitioners introduced an affirmative defense. Under Rule 8(c) of the Federal Rules of Civil Procedure, such new matter is deemed to be denied without reply. Indeed, no reply is permitted except by order of the Court. See Rule 7(a). Therefore, the new matter alleged in the answer was not before the court on a motion to dismiss and is not material at the present stage of this litigation.

In brief, the question before the Circuit Court of Appeals was whether the facts (1) that respondent's status had been created by a contract of hire and (2) that he had been employed for a definite salary, operated as a matter of law to preclude this suit.

With the issue thus defined and restricted the Circuit Court of Appeals concluded that no waiver had been shown and remanded the case for trial.

The petition for certiorari neither comprehends the issue thus outlined nor suggests any reason for the review of the decision thereon. None of the parties will suffer any legal detriment from the order of the Circuit Court of Appeals requiring a trial of the entire cause on its merits. Questions of law can then be considered in the light of all material facts. Whatever the event of such a trial may be, the dissatisfied party or parties will be in position to ask that the issue of waiver be reviewed, along with any other matters in controversy, upon the complete record.

CONCLUSION

In such circumstances neither public interest nor the interests of the litigants will be served by the granting of certiorari as now prayed; but, on the other hand, orderly and complete disposition of this litigation can best be accomplished by remanding the cause for trial as ordered by the Circuit Court of Appeals.

Wherefore, we respectfully submit that the petition for certiorari should be denied.

LEON A. RANSOM
1512 Girard Street, N.E.
Washington, D. C.
THURGOOD MARSHALL
Baltimore, Md.
Counsel for Respondents

WILLIAM H. HASTIE
Washington, D. C.
OLIVER W. HILL
Richmond, Va.
BENJAMIN KAPLAN
New York, N. Y.
W. ROBERT MING, JR.
Chicago, Ill.
Of Counsel